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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-889

PHYLLIS ANN SMITH,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Albert L. Fary, Jr., Esquire
218 London Boulevard
Portsmouth, Virginia 23704

J. Wayne Sprinkle, Esquire
704 Professional Building
505 Washington Street
Portsmouth, Virginia 23704
Counsel for Petitioner

Anthony Troy, Acting Attorney General
Commonwealth of Virginia
Virginia State Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219
Counsel for Respondent

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Phyllis Ann Smith, hereby petitions for a writ of certiorari to review the decision of the Supreme Court of Virginia, made on September 8, 1977, which affirmed the decision made by the trial Court.

OPINIONS BELOW

The Supreme Court of Virginia's opinion decided on September 8, 1977, is appended hereto in the appendix. The Supreme Court of Virginia did not write a formal opinion.

JURISDICTION

The order sought to be reviewed is the September 8, 1977, decision. No petition for rehearing was made nor was any extension granted to file this petition for certiorari. The statutory provision believed to confer jurisdiction in this Court to review the judgment in question is 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Is it a denial of the equal protection of the laws or due process of the law, or both, for the Virginia State Court to take the view that a husband can violate his estranged wife's property rights without impunity, thus denying her the right to defend her property from invasion by the husband?

2. Whether the instruction on the applicable Virginia statute regarding the use of a firearm was a violation of the double jeopardy guarantee?

STATUTE INVOLVED

There are no statutes directly involved.

STATEMENT OF THE CASE

A. STATEMENT OF MATERIAL PROCEEDINGS

Phyllis Ann Smith (hereinafter referred to as the defendant) was indicted for the murder of Fred A. Smith, her estranged husband, and for using a firearm during the commission of said murder. On November 16, 17 and 18, 1976, she was tried before a jury and the Honorable Robert F. McMurran, the Chief Judge of the Circuit Court of the City of Portsmouth, Virginia.

After the presentation of the evidence and argument, the jury returned its verdicts finding the defendant guilty of voluntary manslaughter and using a firearm during a felony and fixing her punishment at ten years in Virginia State Penitentiary for manslaughter and one year for the use of a firearm.

Subsequent to the filing of a presentence report and a hearing on said report, the judge entered judgments on January 14, 1977, fixing the defendant's punishment at ten years in the penitentiary, with five years being suspended, for the manslaughter and one year for the firearm charge.

B. Facts

During the afternoon of July 24, 1976, the defendant received several telephone calls from her estranged husband, Fred Smith, who sounded intoxicated in the last call.

Later, at approximately six (6) p.m., Mr. Smith came to the defendant's apartment and knocked on the door. Before opening the door, the defendant ascertained that the caller was her estranged husband, who was prohibited by Court Order from harming, threatening or annoying her, and from entering into her place of residence or frequenting or loitering in that vicinity. She refused him entrance and threatened to call the police if he persisted. He replied that she could call the police. While she was calling the operator to contact the police, he kicked the door down, breaking the lock and chain off the door, and entered the apartment; he immediately approached Mr. Wilson C. Vincent, a fellow employee and dinner guest of the defendant, and physically attacked him.

Defendant then called the Portsmouth Police declaring that her estranged husband had broken into her apartment and was killing a guest. She also attempted to obtain help from a neighbor, who in turn, telephoned the police reporting that a fight was occurring in defendant's apartment, defendant had a gun, and a gunshot had just been fired in the apartment.

When the first police officers arrived on the scene, they heard a gunshot fired in the apartment complex. Upon their approach of defendant's apartment, they observed a man (later identified as Mr. Vincent) in the doorway; on entering they spotted the defendant, who stated "he's dead; I shot him".

Defendant testified that when Mr. Smith broke in he said "you're are both as good as dead". While the fight was taking place, she grabbed a gun off the sofa belonging to Mr. Vincent, a hospital security guard, fired two warning shots, and eventually fired one shot in Mr. Smith's direction as he was getting off Mr. Vincent, who at the time was not moving.

Other evidence adduced at trial showed that: (1) the deceased's blood-alcohol test revealed a .21 per cent (T.70); he was a violent man when he drank (T.102); he drank alot and the marriage between the defendant and Mr. Smith was replete with fights.

Over the objection of defense counsel, several instructions were given to the jury; over objection several other instructions were refused or altered (see discussion infra).

After the jury was instructed and was considering its verdict, a hearing was held in chambers wherein two witnesses told the judge and counsel that one Commonwealth witness had allegedly perjured herself during the trial. According to Mr. and Mrs. Service, Mrs. Catherine Smith had lied in open Court regarding her statements that Fred Smith had not been drinking on the day he died and he had not threatened Mr. Vincent's life. Defense counsel moved for a mistrial on the basis of perjured testimony and the allegation that the threat had been passed on to Commonwealth's Attorney's office prior to trial, but was not revealed to defense counsel even though he had moved for production of all exculpatory evidence in the Commonwealth's possession.

The motion for a mistrial was denied.

REASONS FOR GRANTING THE WRIT

1. THE COURT BELOW COMMITTED REVERSIBLE ERROR IN ALTERING INSTRUCTION NUMBER 12 AND IN REFUSING TO GRANT INSTRUCTIONS NUMBERED 7, 16 AND 18.

The defendant, by counsel, respectfully submits that the trial court committed reversible error in altering instruction 12 and in refusing instruction 16 and 18.

Instruction 12, as submitted by defense counsel, stated:

> The Court instructs the jury that justifiable homicide is a killing of a human being in the necessary or apparently necessary defense of oneself or close friends from great bodily harm, apparently attempted to be committed by force or in defense of home, property or person against one who apparently endeavors by violence or surprise to commit a felony or either.

Although this instruction was supported by the evidence and case law, e.g., Green v. Commonwealth, 122 Va. 862, 871 (1918), the trial Court struck the words, 'home, property or" and "or either" from the instruction.

In addition, the court refused to allow these instructions:

Instruction 7 -

> "The Court instructs the jury that a person does not have to retreat or flee from anyone when they are defending their homes and may use such force."

Instruction 16 -

> "A person has the right to use reasonable force, and if necessary, to kill another who manifestly intends and endeavors by violence or surprise to commit a felony on her."

Instruction 18
"A person has the right to use reasonable force, and if necessary, to kill another who manifestly intends and endeavors by violence or surprise to commit a felony aginst any habitation."

These two stock instructions were supported by the evidence; however, as with the altering of Instruction 12, the Court below would not allow this law to reach the jury. The main reasons for the Courts action were apparently the views that Mr. Smith could break and enter his estranged wife's apartment with legal impunity and that once he was inside the apartment the defense of habitation was not available to the defendant.

At common law husbands and wifes were held criminally liable for crimes committed against each other. Husband & Wife, 41 Am. Jur. 2d, §s 4. But the common law did not recognize crimes committed against the property of a husband or wife committed by the other spouse. Id. see also, State v. Weitzel, 112 Ohio App. 300, 168 N.E. 2d 550, 551 (1960) (a husband cannot steal from his wife or burglarize his wife's home).

Yet, by statute, as the Married Women's Acts (e.g., Va. Code §§55-35, et seq.), the property rights of married women have been upheld against the husband's marital claims. See e.g., Vigilant Ins. Co., 197 Va. 216, 226 (1955). Thus, a husband can be held as a criminal trespasser upon his wife's lands. Edmonds v. Edmonds, 139 Va. 652, 124 S.E. 415 (1924).

Whether burglary is considered a crime against property or against the person, it would seem that today a husband can indeed be found guilty of burglary of his wife's

residence. Since burglary is often termed an offense against possession of property, not ownership of the property, whether the wife rents an apartment or a house or owns her residence should not control. See, e.g. Bradley v. State, 244 Ind. 630, 195 N.E. 2d 347, 349 (1964); 12 C.J.S., Burglary, §s 26, p. 685.

The "old" common law cases like State v. Weitzel, supra, are predicated upon the logic that since a wife's property is actually her husband's, the husband cannot steal from himself or break into his own house or apartment. The policy behind the Married Women's Act has vitiated this reasoning. Here, the facts of the apartment being in defendant's name alone, the injunction against Mr. Smith, and Fred Smith, was not given a key by Mrs. Smith to enter, all negate any marital consent to enter by a real or constructive co-owner. Compare, Balletti v. State, 261 So. 2d 510 (Husband with key, therefore, his wife consented to his entrance or of the entrance of his agents).

Of course, the equal protection guarantee of the Fourteenth Amendment of the United States Constitution also nulifies the old common law view allowing the husband immunity with reference to her property rights.

On the view that once Fred Smith was in the apartment, the evidence clearly showed that he was not under control but had assaulted Mr. Vincent. The court below felt the defense of habitation extended beyond the entrance of the place of habitation if the intruder was not under control (T. 145-146). In Fortune v. Commonwealth, 133 Va. 669, 688 (1922), and Pierce v. Commonwealth, 135 Va. 635, 641 (1923), the courts seemed to take contradictory views

on how far the defense of justifiable homicide goes once one has broken the 'thresh-hold of the habitation. Even if the Pierce view that only in extreme cases involving danger to life or danger of great bodily harm will homicides be justified, the evidence manifested both of these circumstances with a man prohibited by court order from entering a habitation who breaks in, who says he will kill both occupants and who proceeds to attack one of them in a very violent manner.

Now, the judge below disallowed any real defense of habitation instruction to be given to the jury and such constituted reversible error because it denied the defendant a right to offer a valid defense under the instant evidence and the law. With this defense the jury could have returned a verdict of not guilty. It is respectfully submitted that this error was, therefore, not harmless and cannot be proven to be so beyond a reasonable doubt.

2. THE JUDGMENT REGARDING USING A FIREARM DURING THE COMMISSION OF A FELONY WAS CONTRARY TO THE LAW, PARTICULARLY IN CONTRAVENTION TO THE DOUBLE JEOPARDY GUARANTEES.

In light of the provisions in the United States Constitution and the Virginia Constitution prohibiting the placing of one in double jeopardy for the same offense, defendant submits she was unlawfully convicted of the same offense twice under the circumstances.

Here, the jury found the defendant guilty of voluntary manslaughter which meant under the circumstances that under sudden excitement and upon adequate provocation she killed Mr. Smith by a gun. Yet, the statute on using a firearm during the

commission of a felony as applied herein necessary included the same criminal elements. Both included the use of an instrumentality causing the death and both included the other elements consistent with the crimes since by the terms of the firearm statute it requires the use of a firearm during a felony. The felony here was the alleged homicide. Thus, the facts necessary to convict on the first charge were also present on the second charge (use of a firearm); this renders a bar to conviction for the second offense. See Miles v. Commonwealth, 205 Va. 462, 467 (1964); Rogers v. Commonwealth, 201 Va. 507, 511 (1960); Whitton v. State, 479 p. 2d 302 (Alaska 1970).

CONCLUSION

For the reasons heretofore stated, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Albert L. Fary, Jr.

Albert L. Fary, Jr., Esquire
218 London Boulevard
Portsmouth, Virginia 2370

J. Wayne Sprinkle, Esquire
704 Professional Building
505 Washington Street
Portsmouth, Virginia 23704

CERTIFICATE OF SERVICE

I hereby certify that three printed copies of the Petition for a Writ of Certiorari in the case of Phyllis Ann Smith vs. Commonwealth of Virginia were deposited to Anthony Troy, Acting Attorney General for the Commonwealth of Virginia, Virginia State Supreme Court Building, Broad Street, Richmond, Virginia, on the 2ND day of December, 1977.

APPENDIX

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218 London Boulevard
Portsmouth, Virginia 23704

J. Wayne Sprinkle, Esquire
704 Professional Building
505 Washington Street
Portsmouth, Virginia 23704
Counsel for Petitioner

Anthony Troy, Esquire
Acting Attorney General for the
Commonwealth of Virginia
Virginia State Supreme Court Building
1101 Broad Street
Richmond, Virginia
Counsel for Respondent

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND on Thursday the 8th day of September, 1977.

The petition of Phyllis Ann Smith, sometimes known as Phillis Ann Smith, for a writ of error and supersedeas to the judgment rendered by the Circuit Court of the City of Portsmouth on the 14th day of January, 1977, in a prosecution by the Commonwealth against the said petitioner for felonies (Indictment No. 28117 - Counts 1 and 2), having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

Record No. 770644

A Copy,

Teste

Howard G. Turner,
Clerk

By:
Richard R Bunch

Deputy Clerk